

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte EDWARD FEDEROWICZ

Appeal No. 2006-1086
Application No. 09/851,208
Technology Center 3600



ON BRIEF

Before FRANKFORT, CRAWFORD and BAHR, *Administrative Patent Judges*.
BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the examiner's rejection of claims 4, 5 and 7-9. Claims 1-3 and 6 have been canceled.

We AFFIRM-IN-PART and enter a new ground of rejection of claims 4, 5, 7 and 8 under 37 CFR § 41.50(b).

BACKGROUND

The appellant's invention relates to a patient levitation apparatus for patient transfer or linen changing. Claim 9, which is reproduced in the opinion section of this decision, is illustrative of the invention.

The examiner relies upon the following as evidence of unpatentability:

Harvey	4,417,638	Nov. 29, 1983
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The following rejection is before us for review.

Claims 4, 5 and 7-9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Harvey.

Rather than reiterate in their entirety the conflicting viewpoints advanced by the examiner and the appellant regarding this appeal, we make reference to the examiner's answer (mailed September 22, 2005) for the examiner's complete reasoning in support of the rejection and to the appellant's brief (filed June 20, 2005) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied Harvey patent, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the following determinations.

We shall not sustain the examiner's rejection of claims 4, 5, 7 and 8 under 35 U.S.C. § 102(b) as being anticipated by Harvey. For the reasons expressed below

in the new ground of rejection, these claims are indefinite. Therefore, the prior art rejection must fall because it is necessarily based on speculative assumption as to the meaning of the claims. *See In re Steele*, 305 F.2d 859, 862-63, 134 USPQ 292, 295 (CCPA 1962). It should be understood, however, that our decision in this regard is based solely on the indefiniteness of the claimed subject matter, and does not reflect on the adequacy of the prior art evidence applied in support of the rejection.

We turn our attention now to the rejection of claim 9. Claim 9 reads as follows:

9. A patient levitation apparatus for a patient comprising:
a patient board having a patient side and a bottom, the patient board adapted for use on a hospital bed; and
a plenum member attached to the bottom of the patient board, wherein the plenum member is adapted to receive a flow of pressurized air and release the flow downwardly through a plurality of holes in the plenum member to provide a layer of air below the patient board supporting the patient.

Harvey discloses an air pallet comprising an upper, generally rigid backing member 22, "which may constitute a rectangular plywood sheet," for supporting a load L and a thin film flexible sheet member 24 sealed at its edges to the generally rigid backing member 22 to define an air plenum chamber 26 with the generally rigid backing member 22 (col. 3, ll. 33-40). The thin film flexible sheet member 24

bears a plurality of small diameter perforations 24b that open unobstructedly to the interior of the plenum chamber 26. The perforations cover the area of the member 22 occupied by the load L (col. 3, ll. 40-45).

The member 22 bears a circular opening or hole 28 at one end thereof and to the side of the load L. A grommet 14 having an opening therethrough is inserted into the opening or hole 28 for receiving an air supply nozzle 16. The air supply nozzle 16 is sealably coupled to an end of a flexible supply hose 38 and receives air under pressure from a supply or source 42. The air source 42 “may comprise a back pack carried, battery operated, or internal combustion engine driven air compressor” (col. 3, ll. 26-27). As explained by Harvey (col. 5, ll. 51-56), “[a]ir tends to escape through the outer rows of perforations 24b, thereby accomplishing jacking of load L and defining a very thin, several mil, air film A to permit frictionless movement of the load by light force movement of the air pallet over the surface 18.”

The appellant argues that the rigid backing member 22 of Harvey’s air pallet is not “adapted for use on a hospital bed” as called for in claim 9. In particular, the appellant argues that Harvey does not disclose that the backing member 22 can have a size or shape that is suitable for transporting a patient comfortably and that a rectangular plywood sheet, by itself, would not be suitable for transporting hospital patients who may have bedsores or other physical ailments (brief, p. 5). Further, the appellant argues that Harvey does not disclose supporting a patient with a patient board (brief, p. 5).

As for the size and configuration of Harvey's rigid backing member 22, Harvey does not specify exact dimensions, indicating merely that it "may constitute a rectangular plywood sheet" (col. 3, l. 36), but is directed to an air pallet "bearing a load L in the manner of U.S. Pat. No. 3,948,344" (col. 3, ll. 18-19). As explained in U.S. Pat. No. 3,948,344, the air pallet is designed to in essence replace the common wooden pallet measuring 48 inches by 40 inches (col. 1, ll. 12-13). In light of this background, a person of ordinary skill in the art would have understood Harvey's rigid backing member 22 to have a load bearing surface of at least similar dimensions to such wooden pallets. A backing member of such dimensions would be fully capable of supporting a patient.

With regard to the appellant's argument that a rigid backing member 22 in the form of a rectangular plywood sheet would not be suitable for transporting hospital patients who may have bedsores or other physical ailments, we note, at the outset, that the claim does not require that the patient board be suitable for transporting patients who have bedsores or other particular ailments. In any event, the appellant has not explained, and it not apparent, why a rectangular plywood sheet would be any less suitable for such use than the "plastic board" described in the appellant's specification.

For the above reasons, we do not find persuasive the appellant's argument that Harvey's air pallet or the rigid backing member 22 thereof is not "adapted for use on a hospital bed" or capable of supporting a patient as called for in claim 9. The rejection of claim 9 as being anticipated by Harvey is thus sustained.

NEW GROUND OF REJECTION

Pursuant to our authority under 37 CFR § 41.50(b), we enter the following new ground of rejection.

Claims 4, 5, 7 and 8 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to distinctly claim and particularly point out the invention.

Specifically, the limitation “approved for use in a hospital” presents a level of uncertainty as to the scope of claims 4, 5, 7 and 8. A product that is at one time not “approved for use in a hospital” and thus not covered by claims 4, 5, 7 and 8 may one day be approved for some use in a hospital somewhere and thus later be covered by the claims. Additionally, as approval for any use in any hospital would meet the “approved for use in a hospital” limitation, it would be difficult, if not impossible, for one practicing in the art to determine, with any reasonable level of certainty, whether a particular product is covered by claims 4, 5, 7 and 8. A person of ordinary skill in the art thus would not be reasonably apprised of the scope of claims 4, 5, 7 and 8 so as to satisfy the definiteness requirement of 35 U.S.C. § 112, second paragraph.¹

¹ The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope. *See In re Warmerdam*, 33 F.3d 1354, 1361, 31 USPQ2d 1754, 1759 (Fed. Cir. 1994).

ADDITIONAL CONSIDERATIONS

In the event of further prosecution of the subject matter of the present application, the examiner may wish to consider the teachings of US Pat. No. 4,528,704, issued to Wegener et al. on July 16, 1985, in combination with other air pallet systems of record in this application. This patent is directed to a semi-rigid air pallet for moving a patient and includes a semi-rigid sheet or board 18, which may be formed of plastic or the like, and thin flexible sheets 12, 14, 16.

CONCLUSION

To summarize, the decision of the examiner to reject claims 4, 5 and 7-9 is affirmed as to claim 9 and reversed as to claims 4, 5, 7 and 8 and a new rejection of claims 4, 5, 7 and 8 is entered pursuant to 37 CFR § 41.50(b).

Regarding the affirmed rejection(s), 37 CFR § 41.52(a)(1) provides "[a]ppellant may file a single request for rehearing within two months from the date of the original decision of the Board."

In addition to affirming the examiner's rejection(s) of one or more claims, this decision contains a new ground of rejection pursuant to 37 CFR § 41.50(b). 37 CFR § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 CFR § 41.50(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid

termination of the appeal as to the rejected claims:

(1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record.
...

Should the appellant elect to prosecute further before the examiner pursuant to 37 CFR § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. § 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If the appellant elects prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.


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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a). *See* 37 CFR § 1.136(a)(1)(iv).

AFFIRMED-IN-PART; 37 CFR § 41.50(b)

Charles E. Frankfort
CHARLES E. FRANKFORT
Administrative Patent Judge

MURRIEL E. CRAWFORD
Administrative Patent Judge


JENNIFER D. BAHR
Administrative Patent Judge

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